

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRIAN B. JOHNSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11915  
Trial Court No. 3PA-13-1512 CR

MEMORANDUM OPINION

No. 6221 — July 29, 2015

Appeal from the District Court, Third Judicial District, Palmer,  
John W. Wolfe, Judge.

Appearances: Chadwick P. McGrady, Palmer, for the  
Appellant. Lindsey M. Burton, Assistant District Attorney,  
Palmer, and Michael C. Geraghty, Attorney General, Juneau, for  
the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler,  
Judges.

Judge MANNHEIMER.

Brian B. Johnson appeals his conviction for driving under the influence.<sup>1</sup>  
He argues that he was subjected to an unlawful investigative stop because the police  
lacked reasonable suspicion to detain him. For the reasons explained here, we conclude

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<sup>1</sup> AS 28.35.030(a).

that the police had adequate suspicion to conduct the investigative stop, and we therefore affirm Johnson's conviction.

### *Underlying facts*

On June 14, 2013, Palmer Police Sergeant Dwayne Shelton was off-duty, and he was riding as a passenger in a friend's vehicle. Shelton and his friend, Seth Elliot, were going to the Palmer cemetery to mow the grass. They were towing their lawn mowers in a trailer behind Elliot's vehicle. Elliot's son was also going to the cemetery, but he was driving separately.

While they were driving to the cemetery, Elliot abruptly stopped his vehicle and got out to confront the driver behind them — who turned out to be Johnson. Johnson had stopped his vehicle close to the back of the trailer carrying the lawn mowers. Shelton had not been paying attention to Johnson's driving, but he saw that Johnson's car had ended up quite close to the trailer — so close that Shelton thought he might have hit it.

According to Shelton's later testimony, Johnson also got out of his car, and he and Elliot were standing in close proximity to each other, "kind of chest to chest", and "yelling words back and forth at each other." Shelton got out of the vehicle, but he did not intervene.

After Johnson and Elliot exchanged a few more words, each of them returned to their vehicles, and Shelton and Elliot then continued on their way to the cemetery. When Shelton and Elliot pulled into the cemetery parking lot, Johnson drove on by.

When Shelton asked Elliot about the confrontation, Elliot told Shelton that Johnson had “come flying up” behind their vehicle, and that Johnson had gestured with his middle finger.

By the time Shelton and Elliot arrived at the cemetery, Elliot’s son was already there. They took their lawn mowers off the trailer and started mowing the grass. But before too long, they saw Johnson’s vehicle return, drive by “real slow,” and then pull into the cemetery.

Johnson drove toward Elliot’s son — which prompted Elliot to go over to where his son was. But Johnson did not approach either Elliot or his son. Instead, Johnson remained at a distance, but he appeared to be taking photographs or video of them with his phone.

At this point, Shelton decided to contact Johnson. Shelton identified himself and told Johnson that he was an off-duty police sergeant. Shelton explained that if Johnson had a “beef” with Shelton’s friend, it would probably not be proper for Shelton to handle the situation, but he (Shelton) could “call the Palmer Police Department [and] have an [impartial] officer ... come [out to] talk with [them].”

Johnson declined Shelton’s offer, indicating that there was no need to call the police because everything was okay. But by this time, while Shelton was standing near Johnson, Shelton noticed the odor of alcohol coming from Johnson’s person. Shelton testified that, initially, the odor was moderate, but the odor became stronger as the two men spoke.

Shelton notified Johnson that he could smell alcohol on his breath, and he asked Johnson if the alcohol might be affecting his judgement. In response, Johnson denied that he had been drinking.

At this point, Shelton asked Johnson for identification, and Johnson handed over his driver’s license. Shelton also called the Palmer Police Department, asking them

to send an officer “[to] make sure that [Johnson] was okay to drive [and was] not ... under the influence.”

A state trooper arrived at the cemetery less than five minutes after Shelton called the police department. The trooper administered field sobriety tests to Johnson and, based on those tests, the trooper arrested Johnson for driving under the influence. A later breath test showed that Johnson’s blood alcohol content was .084 percent.

After Johnson was charged with driving under the influence, he moved to suppress the evidence of the field sobriety tests and the breath test, claiming that he had been subjected to an unlawful investigative stop. Following an evidentiary hearing, the district court ruled that Johnson had been seized when Shelton took his driver’s license and informed him that he was calling another officer to determine if Johnson was impaired. However, the district court concluded that this investigative seizure was justified by “reasonable suspicion that the defendant had committed DUI”. The judge therefore denied the suppression motion.

#### *Johnson’s argument on appeal*

Given this evidentiary record, Shelton could reasonably believe that Johnson had been driving and that Johnson had been drinking alcoholic beverages. Johnson argues, however, that there were “[no] indicia that [he] posed a danger to the public” — *i.e.*, no indication that he was impaired.

Johnson points out that the State presented no evidence that he was “swaying”, or that he had “bloodshot[,] watery eyes, [or] slurred speech”. But while these physical symptoms are common indicators of impairment, they are not the only ones.

Here, Shelton had reason to believe that Johnson had just engaged in aggressive driving (tailgating Elliot’s vehicle, and flipping him off). Shelton also had reason to believe that Johnson was lying when he denied drinking any alcoholic beverages, because he smelled of alcohol.

Moreover, Shelton knew that Johnson had initially driven past the cemetery, but had then returned to the cemetery and had begun taking photographs or video of Elliot. There was no apparent reason for this behavior, other than Johnson’s lingering resentment over the confrontation on the road. This behavior, coupled with evidence that Johnson had falsely claimed not to have been drinking, gave rise to a reasonable suspicion that Johnson was impaired — that he was not capable of operating a motor vehicle “with the caution characteristic of a person of ordinary prudence who is not under the influence”.<sup>2</sup>

We therefore conclude that Shelton acted lawfully when he temporarily detained Johnson to allow the state trooper to arrive and conduct the DUI field investigation at the cemetery.

### *Conclusion*

The judgement of the district court is AFFIRMED.

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<sup>2</sup> *Molina v. State*, 186 P.3d 28, 29 (Alaska App. 2008), quoting *Gundersen v. Anchorage*, 762 P.2d 104, 114-15 n. 7 (Alaska App. 1988).